

Personnel Issues for County Attorneys

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Overview



- Legal Framework of County Employment Relationship
- Employee Conduct and Progressive Discipline
- Overview of Employment Law Compliance Issues



The County Personnel Management Act

- **Merit system** for Utah counties except as otherwise specifically provided.
- County Commission has option of using CPMA alone or in combination with existing peace officer/firefighter systems.
- If **fewer than 200** employees not covered by other merit systems, or exempt, **compliance is an option**, unless county was already complying before May 6, 2002.



Counties not covered by the CPMA

- County may have formal personnel policies and procedures or an employee handbook. Be familiar with these.
- Employment is at will
- Written materials, including policies, may contain promises that could create implied contractual rights.
- Don't provide process where no process is due.
- Do not terminate for reasons that may violate public policy.
- Courts may imply a covenant of fair dealing.



Establishment of Career Service Council

(17-33-4)

- Three Member **Bipartisan** Body in **sympathy with Merit Principles** (17-33-3)
- Hears appeals of grievances not resolved at lower levels (suspensions, transfers, demotions, dismissals and **other grievances as defined**)
- May affirm, modify, vacate, or set aside a disciplinary order
- Decision may be appealed to District Court within 30 days of CSC decision
- Court affirms unless Council's decision is **arbitrary or capricious**

Director of Office of Personnel Management

-Merit or Appointed-

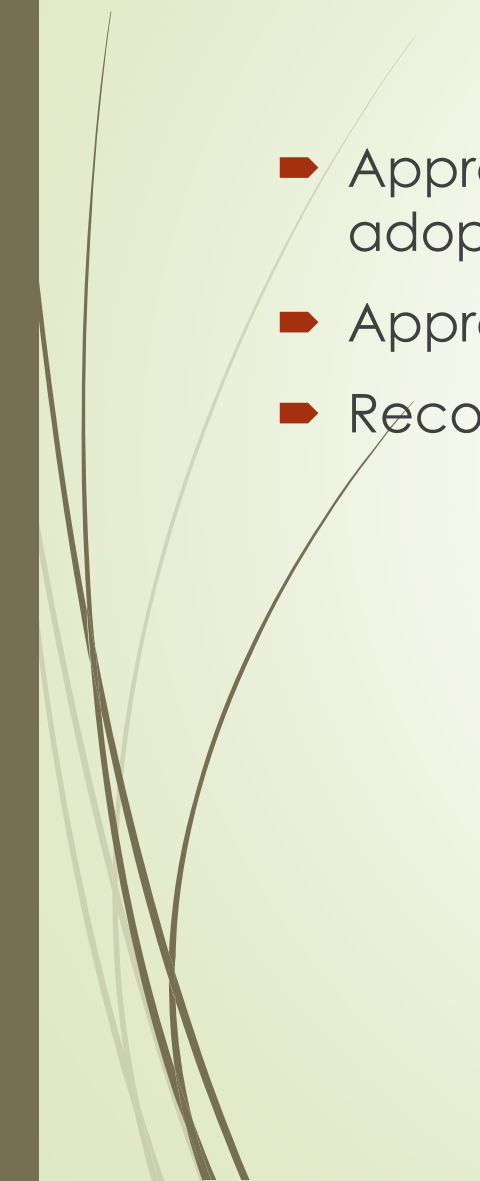
(UCA 17-33-5 and 17-33-7)

SHALL:

- Advise county legislative and executive bodies on the use of human resources
- Develop and implement programs for improvement of employee effectiveness
- Recommend Personnel Rules
- Design and administer County Pay Plan including salaries, wages, incentives, bonuses, leave, insurance, retirement, and other benefits
- Design and administer classification plan (final authority)
- Monitor compliance with EEO and Affirmation Action guidelines
- Maintain central personnel records



County Executive may:

- Approve, amend or reject Personnel Rules before adoption.
 - Approve, amend or reject the pay plan.
 - Recommend Personnel Rules
- 



Rules Shall Provide for:

(17-33-5)(3)(b)

- Recruiting and selection assuring **open competition**
- Establishment of job related **minimum requirements**
- Preparation, maintenance, and revision of a position **classification plan**
- Keeping **records of performance**
- Plan governing layoffs and **reductions in force**
- Plan for resolving employee **grievances** and complaints
- Establishment of disciplinary measures and **appeal processes**
- Establishment of **hours of work, holidays** and attendance requirements
- Establishing and publicizing of **fringe benefits**

County Departments, Offices or Agencies

(UCA 17-33-7(2))

SHALL:

- Establish **initial job descriptions**
- Recommend positions/classifications
- Make **final selections** for promotions and hires
- Conduct **performance evaluations**
- **Discipline** employees

Career Service or Merit Positions

all except those specifically exempted


(17-33-8)

- Career Service employees are not employees at will
- May have property and/or liberty interest in employment
- Can't be deprived of interest without **due process**



Employee Conduct and Progressive Discipline


- Supervisors have the right and responsibility to supervise.
- **Progressive discipline** process incorporates employee's right to due process.
- Performance evaluation system is the foundation for good management of employee conduct.



Personnel Rules must provide a **system** for imposing discipline and processing grievances

Steps and elements defined, e.g.

1. Oral Reprimand
2. Written Reprimand
3. Suspension without Pay
4. Demotion
5. Suspension without Pay Pending Termination



Rules should provide a mechanism for skipping one or more steps for serious infractions.

- Misconduct vs. poor performance
- Employee should be on notice of employer's expectations.
- Rules should be applied with consistency and fairness.
- Decisions should be made by consensus.



Due Process



- Employee should have an opportunity to be heard BEFORE discipline is issued.
- Rules and disciplinary notices should clearly state how, when, and to whom an appeal or request for review may be filed.



Specific Policies

Gender and other forms of discrimination

- Policy should
 - Prohibit and define inappropriate activity
 - Provide multiple avenues for complaints
 - Be disseminated to entire workforce which should include periodic training
 - Provide for prompt and thorough investigation (by neutral party)
 - Provide for appropriate disciplinary action
 - Prohibit against retaliation



Electronic Usage Policy

Points to Consider

- No expectation of privacy (random monitoring, etc.)
- Minimal personal use
 - No personal business, illegal activity
- No inappropriate content (derogatory, lewd, indecent, sexual, defamatory, threatening, political or harassing)
- No sharing of passwords, security, etc.
- Applies to all electronic communication sent, received, displayed, etc. using county equipment including from remote locations.
- Violations will result in discipline up to and including termination.
- Social Media
- Litigation Holds



Investigations



- Decide who best to conduct investigation
- Act promptly, take seriously
- Document witness interviews and conclusions carefully
- Keep as confidential as possible, but don't promise confidentiality
- Communicate conclusion to affected parties
- Every employee has duty to cooperate with reasonable investigation
- Garrity warning if criminal implications



Other Employment Law Compliance Issues

- Notices and Postings
- Leave and Disability
 - (ADAAA, FMLA, Worker's Comp)
- FLSA
- USERRA
- OSHA (UOSH)
- IRCA, Senate Bill 81 (e-verify)
- Title VII, ADEA, OWBPA
- COBRA, HIPPA, GINA, ACA



Posting Requirements

- Prominent locations accessible to employees
- Wage and Hour (FLSA)
- EEO consolidated
 - (ADEA, ADAAA, Title VII, etc.)
- FMLA
- USERRA
- Federal Contracts
- State Worker's Compensation
- State Unemployment



Employment Discrimination Laws

➤ Protected Classes

- Race, Color
- National Origin
- Religion
- Sex
- Age
- Disability
- Genetic Information
- Additional Classes defined by State/Local laws



Types of “Discrimination”

- Disparate impact vs. disparate treatment
- Illegal Discrimination vs. Unfair Treatment
 - “Hostile work environment” complaints
- Retaliation
 - Employee engages in **protected activity**
 - Employee suffers **adverse employment action**
 - **Causal link** between the two



Leave and Disability

- ADAAA
- FMLA
- Worker's Comp
- Sick leave policies
- Short and long term disability policies



Overriding Principle

- Analyze employer obligations under each law or policy separately, then
- Employee gets the best of each world at every step of the way.



General Purpose of Law

➤ FMLA

- Provides limited leave from work for certain family and medical reasons
- Federal law enforced by DOL

➤ ADAAA

- Prohibits discrimination against certain disabled employees/applicants
- Requires employer-provided “reasonable accommodation” to applicants and employees with qualifying disabilities
- Federal law enforced by EEOC

➤ Worker's Compensation

- Provides medical care and partial wage replacement for workplace injuries and illness regardless of fault
- State law enforced by Utah Labor Commission



Overview of FMLA

➤ FMLA

➤ Four types of leave

- **Family Leave** for birth/adoption/foster care
- **Military Caregiver** Leave
- **Military Qualifying Exigency** Leave
- **Medical leave**, self or family, for **Serious Health Condition**
- **Serious Health Condition**: an illness, injury, impairment, or physical or mental condition that involves
 - Inpatient Care (overnight stay) or
 - Continuing treatment by a Health Care Provider
 - 3 or more days of incapacity plus
 - Treatment two or more times by Health Care Provider or
 - Treatment one time that results in a regimen of continuing treatment under supervision of HCP
 - Pregnancy (any period of incapacity)
 - Chronic conditions requiring treatment by HCP



Duration and Benefits of FMLA Leave

- Up to 12 weeks unpaid leave per year
 - (Except Military Caregiver is up to 26 weeks)
 - “Year” defined by policy
- Medical leaves may be taken intermittently
- Group Health Plans must be maintained
- Leave is unpaid, but employer may (should) run FMLA concurrently with paid leaves
- Entitled to reinstatement to same or equivalent position



FMLA Leave Requests and Responses

- Foreseeable need: 30 days in advance
- Unforeseeable need: as soon as practicable
- “Magic words” not required
- Employer must respond within 5 business days
- Limited/highly regulated medical certification allowed



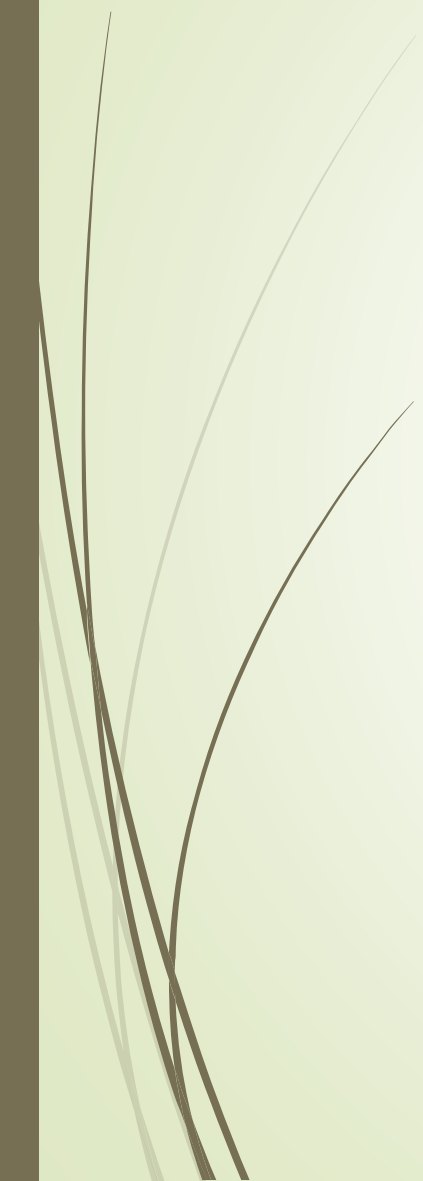
Overview of ADA and ADAAA

➤ ADA/AA

- Physical or mental impairment which substantially limits one or more major life activities
- Has a record of such an impairment
- Is regarded as having such an impairment
- Does not generally include impairments of short term duration or normal pregnancies
- Now interpreted much more broadly, in favor of employee



Employer's ADA Obligations

- 
- Do not discriminate against disabled
 - Engage in **interactive process** with employee—no “magic words” required
 - Provide reasonable accommodation (employees and applicants) to allow performance of **essential functions** of job (unless undue hardship)
 - Do not make inappropriate medical inquiries
 - Maintain separate confidential medical files




Overview of Worker's Compensation

➤ Coverage

- Injuries and illnesses arising **out of and in the course of** employment
- Pays medical expenses and provides partial income replacement to injured employee
- **Exclusive remedy** for employment-related injuries/illnesses
- File **First Report of Injury** within 7 days (new penalties)

➤ Sick leave and Long Term Disability

- Defined in policies



Pregnant Employees



- Not a disability (but complications may be)
- Apply policies as you would to any other short term disability
- Employee may work up to date of delivery if able to perform job functions
- Don't ask employees or applicants about plans to have children/pregnancy status,
- ACA and Nursing Mothers



Medical Inquiries and Information

- Should be coordinated by and maintained by **personnel** “experts”
- Every situation **evaluated individually**
- Supervisors should not request medical information and should only receive such information on a **“need to know”** basis.
- Don't allow county employees to make medical decisions and don't allow doctors to make personnel decisions
- **GINA** considerations—No family medical history
- Do not allow any **retaliation** or penalty against any employee who exercises legally protected rights under any of these laws.



Fair Labor Standards Act

- Elected Officials and personal staff not covered
- Requirements
 - Pay employees at or above Federal Minimum Wage
 - Pay overtime at 1.5 time the regular rate of pay for hours worked over 40 in a workweek



Compensatory Time



- Available option for state and local governments
- Must be covered by employment agreement or memorandum of understanding BEFORE the performance of work
- Employee must be permitted to use time within “reasonable period” if it does not “unduly disrupt” operation
- Must be calculated at time and a half
- Cap of 240 hours (160 hours worked) for most employees
- Cap of 480 hours for law enforcement
- Must be paid at termination at higher of (a) average regular rate of pay during last three years or (b) final regular rate of pay



Federal Laws: Fair Labor Standards Act

- Exemptions – Who is exempt and what are they exempt from?
 - Salary Basis (set salary regardless of quantity or quality of work performed)
 - Salary Level (\$455 per week)
 - Job Duties
 - Executives
 - Administrative
 - Professionals (Learned or Creative)
 - Outside Salespeople
 - Computer Professionals



Federal Laws: Fair Labor Standards Act

- What it means to be exempt
 - Overtime pay is not required
 - Deductions from pay are generally not permitted
 - Time cards/ record of work hours allowed and encouraged
 - Be careful—**audits** increasing in this area
 - Law Enforcement and First Responders--2004 amendments



Federal Laws: Fair Labor Standards Act

➤ FLSA Issues

➤ What are **Hours Worked**?

- All time “controlled and required by the employer” and “pursued necessarily and primarily for the benefit of the employer”
- All time employee is “**suffered or permitted**” to work
- Insignificant periods of time outside of working hours may be disregarded (de minimis rule)

➤ Travel Time

➤ Training Time

➤ On-Call Time

➤ No Requirement to provide meal or break periods, vacation pay, sick leave, shift differential, etc.



(2004 Changes)

Law Enforcement and First Responders

- **Exemptions do not apply** to Police Officers, Detectives, Deputy Sheriffs, Investigators, Correctional Officers, Fire Fighters, Rescue workers, etc. (first responders) REGARDLESS OF RANK OR PAY LEVEL who perform work such as preventing, controlling, or extinguishing fires, preventing or detecting crimes, conducting investigations or surveillance, interviewing witnesses, preparing investigative reports, or other similar work.



Law Enforcement and First Responders

- High level police and fire officials may be **exempt** if their primary duty is performing managerial tasks such as evaluating personnel performance; enforcing and imposing penalties for violations of the rules and regulations; making recommendations as to hiring, promotion, discipline or termination; coordinating and implementing training programs; handling community complaints, preparing budgets and controlling expenditures; ensuring operational readiness; deciding how and where to allocate personnel; maintaining inventory of property and supplies; and directing operations at crime, fire or accident scenes.



USERRA

Uniform Services Employment and Reemployment Rights Act

- Protect **reemployment rights** of employees who are called to duty in the **Uniformed Services**
- Cumulative five year period of military service (may be more)
- Applies to service under federal authority, (voluntary, involuntary, active duty, national guard etc.)
- Notice encouraged, but can't be required in all cases
- Deadlines for employees Notice of Intent to Return to Work
- Prompt reemployment required
- **"Escalator" principle** applies to promotions, salary increases etc. that employee would have received with "reasonable certainty."
- **No discharge** without cause for one year (if 6 months military service)
- **Benefit protections**



Cardinal Rules



- Communicate **clear expectations** in Rules and Policies and performance evaluations.
- Address and **document** performance problems as well as corrective measures taken.
- Treat employees **consistently and fairly**.
(No good deed goes unpunished.)
- **Address small problems** before they become big issues.
- **Do not** allow supervisors or coworkers to **retaliate**.



2015--What lies ahead?

- More changes!
 - Health Care Reform—State and Federal
 - State Retirement Amendments
 - More zealous investigations, audits and enforcement!
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